IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

NO. 75-1769

THE GREAT UNITED REALTY COMPANY, INCORPORATED,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

SHELDON H. BRAITERMAN

506 Tower Building
Baltimore, Maryland 21202

Attorney for Petitioner

The Paul M. Harrod Company, Baltimore, Maryland 21234

INDEX

TABLE OF CONTENTS

TABLE OF CITATIONS

Cases Page

Miscellaneous

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

The Great United Realty Company, Incorporated, Petitioner herein, respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fourth Circuit, entered in the above captioned case on January 21, 1976.

OPINIONS BELOW

The opinion of the United States District Court for the District of Maryland is not officially reported and appears as Appendix A, *infra.*

The opinion of the United States Court of Appeals for the Fourth Circuit is not officially reported and appears as Appendix B, *infra.*

The denial of Petition for Rehearing by the United States Court of Appeals for the Fourth Circuit is not officially reported and appears as Appendix C, *infra.*

JURISDICTION

The judgment of the United States Court of Appeals for the Fourth Circuit was entered on January 21, 1976. A Petition for Rehearing was thereafter filed by Petitioner in the United States Court of Appeals for the Fourth Circuit, which petition was denied on February 9, 1976. On or about May 10, 1976 this Court granted Petitioner an extension of time to June 8, 1976 to file this Petition for Writ of Certiorari. The jurisdiction of this Court is invoked under 28 U.S.C. 1257(2)

QUESTION PRESENTED

Was a statutory notice of deficiency, which was purportedly issued pursuant to 26 U.S.C. 6212, but which incorrectly named the taxpayer and not actually received by the taxpayer, defective so that the subsequent assessment and collection of income taxes were illegal?

STATEMENT OF THE CASE

The Great United Realty Company, Incorporated (herein Petitioner) brought this action in the United States District Court for the District of Maryland to enjoin the collection of an assessment of additional income taxes allegedly due for the taxable year ending March 31, 1971.

The jurisdiction of that court was invoked under 28 U.S.C. §1346.

The United States (hereinafter "Respondent") moved to dismiss or in the alternative for summary judgment. The District Court granted the motion for summary judgment.

On August 3, 1971, pursuant to a proper extension, Petitioner, a body corporate of the State of Maryland, filed its United States Corporation Income Tax Return, for the taxable year ending March 31, 1971. The return showed taxable income of $2656 calculated as follows:

Gross income		$21,031
less ordinary deductions	$16,569	
less net operating loss	1,806	
Taxable income		2,656

The gross income consisted of the following three items:

1. Other interest	$ 8,184
2. Rents	9,830
3. Profits realized on notes and contracts	3,017

The total tax due, as shown on the return was $762, which sum was remitted when the return was filed.

On February 19, 1974, the Internal Revenue Service, issued a statutory notice of deficiency, purportedly pursuant to Section 6212 of Title 26 of the United States Code. The notice was addressed to Great United Realty Company, Inc. rather than to The Great United Realty Company, Incorporated. The deficiency asserted Petitioner failed to pay personal holding company tax of $2622, purportedly imposed pursuant to Section 541 of Title 26 of the United States Code. Petitioner did not accept delivery of the statutory notice of deficiency and did not file a petition with the United States Tax Court for a redetermination of the deficiency.

On July 22, 1974 Petitioner was assessed an income tax for the taxable year ending March 31, 1971 in the total amount of $3,115.19, said sum consisting of the $2,622.00 deficiency, and plus accrued interest. Appellant did not pay the taxes allegedly due. On October 22, 1974 an administrative levy was issued to the Baltimore Federal and Savings and Loan Association, seizing all the assets belonging to Petitioner. Subsequent thereto, Baltimore Federal Savings and Loan Association paid the Internal Revenue Service $3,225.60, the amount specified in the administrative levy, and charged said sum against Petitioner's account.

On October 29, 1974, Petitioner filed this action, seeking a temporary restraining order and permanent injunctive relief. On October 31, 1974 a hearing was held on Appellant's request for a temporary restraining order and the request was denied.

On December 23, 1974, Respondent moved for summary judgment on the grounds that the District Court lacks

jurisdiction to hear the action and that Petitioners had failed to state a claim upon which relief could be granted. On March 19, 1975, the District Court found that it was by no means clear that the Government could not establish its claim and that Petitioner had an adequate remedy under the procedures authorized by the Internal Revenue Code. Accordingly, the District Court ruled that *Enochs v. Williams Packing Co.*, 370 U.S. 1 (1962) and 26 U.S.C. section 7421(a) mandated dismissal of the action without prejudice to any right Petitioner might have to challenge the assessment in any manner provided by law.

An appeal to the United States Court of Appeals for the Fourth Circuit followed. On January 21, 1976 that court affirmed the District Court. Petitioner filed a Petition for Rehearing. On February 9, 1976, the United States Court of Appeals for the Fourth Circuit passed an Order stating "no request for a poll of the court being made on the suggestion for rehearing *en banc*, and with the concurrence of Judge Winter and Judge Butzner.

IT IS ORDERED that the petition be, and the same is hereby, denied."

STATUTES INVOLVED

The statutes involved are United States Code, Title 26, Sections 541, 543(a)(2), 547, 6212, 6213(a), and 7421, and Title 28 Section 46(c) which appear as Appendix D, *infra.*

REASONS FOR GRANTING WRIT

The District Court erred in holding that this action was controlled by the "anti injunction" statute, section 7421(a) of Title 26 of the United States Code and *Enochs, supra.* 26 U.S.C. section 7421(a) provides:

> "*Except as provided in . . . section 6213(a),* no suit for the purpose of restraining the assessment or collection of any tax shall be maintained, in any court by any person . . . " (emphasis supplied)

In *Enochs, supra,* this court held that the above statute barred all action unless the taxpayer could establish

> "That under no circumstances could the Government ultimately prevail." *Enochs, supra* at page 7.

However, there is an exception to the above test set forth in 26 U.S.C. section 6213(a). That section provides in relevant part:

> "Except as otherwise provided in section 6861 no assessment of a deficiency respect of any tax imposed by subtitle A or B and no levy or proceeding in court for its collection shall be made, begun or prosecuted *until* . . . notice [of deficiency authorized in section 6212] has been mailed to the taxpayer . . . *Notwithstanding the provisions of section 7421(a),* the making of such assessment or the beginning of such proceeding or levy during the time such prohibition is in force *may be enjoined by a proceeding in the proper court."* (emphasis supplied)

Section 6861 concerns jeopardy assessments and does not apply here.

Section 6212 requires notice of deficiency be given the taxpayer. For income taxes, a notice of deficiency "mailed the taxpayer at his last known address, shall be sufficient".

Therefore to obtain the injunctive relief prayed for, Petitioner need not demonstrate there is no possibility the government can win. It need only demonstrate that the statutory notice of deficiency was defective.

In this case the statutory notice of deficiency did not bear Petitioner's true name. It is also undisputed that Petitioner never actually received the notice. Under the applicable case law, these two facts render the statutory notice of deficiency fatally defective.

In *Shea v. Commissioner,* 31 B.T.A. 513 (1934), a notice of deficiency was sent to "Mrs. Mary M. Shea, Trustee, Isabell Shea, et al." Mary M. Shea filed a Petition with the Board of Tax Appeals in her individual name alleging she was not the trustee. A proper notice of deficiency was a necessary prerequisite for the jurisdiction of the Board of Tax Appeals, just as a proper notice of deficiency is a necessary prerequisite to assessment and collection under 26 U.S.C. section 6213(a). In *Shea* the Board held it was without jurisdiction, stating at page 515:

> "The Commissioner may not conjure up a taxpayer for the purpose of computing a profit and collection a tax, and if there is no such fiduciary as was named in the notice of deficiency, his determination will not aid him in collecting."

In *Dombrowski v. Commissioner,* 35 B.T.A. 1028 (1937) a notice of deficiency was sent to

> "Mrs. Leesa Dombrowski, Surviving Cotenant of Gottlieb Dombrowski, Deceased."

The notice contained an alleged deficiency asserted against Gottlieb Dombrowski. A Petition with the Board of Tax Appeals was filed. Again the Board held it was without jurisdiction over the matter, stating at page 1029:

> "[S]ince the person to whom the notice was sent and the only person who appeared as the petitioner before the Board is not a person authorized to represent the estate of Gottlieb Dombrowski, deceased, it follows that the Board has no jurisdiction to decide whether or not there is a deficiency in the income tax of Gottlieb Dombrowski, deceased."

In accord is the unreported case of John A. Hampton and Son, which is digested in Commerce Clearing House, Inc., *Standard Federal Tax Reporter,* Vol. 7, ¶5322.5251. In that case the notice of deficiency was mailed to "John H. Hampton and Son", but there was no such taxpayer. A petition was filed on behalf of "J.A. Hampton" individually. The Board of Tax Appeals denied jurisdiction.

The above three cases indicate that notices mailed to and/or attempting to assert deficiences against misnamed taxpayers are ineffectual. There have been cases where a notice to an incorrectly named taxpayer has been sufficient, but in each such case the Courts have placed great emphasis on the fact the taxpayer *actually* received the notice *and* was

in no way misled or prejudiced by the error in name. See *McCarthy Co. v. Commissioner,* 80 F.2d 618 (C.A. 9 1935) cert. den. 298 U.S. 655, *Haag v. Commissioner,* 59 F.2d 516 (C.A.7 1931), *Commissioner v. New York Trust Co.,* 54 F.2d 463 (C.A. 2 1930), and *Burnet and San Jaoquin Fruit and Investment Co. v. Commissioner,* 52 F.2d 123 (C.A. 9 (1930).

Applying the principles of the above cases to the case at bar, Petitioner's failure to receive the notice is particularly prejudicial. Petitioner has been deprived of his opportunity to have his case heard in the United States Tax Court. (Similar substantive personal holding company issues arose with this taxpayer and related corporations before the Tax Court, and the substantive personal holding company issue was conceded by government counsel.) Normally, such a denial is not irreparably injurious, since the taxpayer can pay the tax and file for refund. Indeed, that is the rationale underlying *Enochs, supra* and 26 U.S.C. section 7421(a). In this instance, however, the dispute involves the personal holding company tax imposed by 26 U.S.C. section 541. Had Petitioner been afforded and availed itself of the opportunity to litigate in the Tax Court and lost, then Petitioner would be entitled to the deduction for deficiency dividends pursuant to 26 U.S.C. section 547, which section was intended to lessen the arbitrarily punitive effect of 26 U.S.C. section 541. The personal holding company tax rate is 70 percent. If deficiency dividends were paid, no personal holding company tax would be due. The shareholders would be required to report the dividends as ordinary income on their personal returns. If the shareholder had losses, there would be no additional tax due. In this case the shareholders' losses would offset the dividend and result in no tax at all.

However, having been denied the opportunity to go to the Tax Court, if Petitioner loses this suit, his sole remedy would be a suit for refund. In such a suit Petitioner could only challenge the correctness of the personal holding company tax. It could not base its refund claim on a potential deduction of the deficiency dividend, for such a deduction is permissible only *after* a "determination" (in this instance by refund suit) of the personal holding tax liability. Assuming Petitioner lost its refund suit, it would be precluded from filing a second refund suit, because the tax liability for a year is a *single* cause of action and the first refund suit would be *res judicata as to* the second.

Therefore, Petitioner submits the fact that it was improperly named on the alleged notice, that it never received said notice and that it could incur substantial injury as a result of the failure to receive renders the notice of deficiency improper. Accordingly, the subsequent assessment and collection procedures were in violation of 26 U.S.C. section 6213(a) and Petitioner is entitled to injunctive relief.

The above is an important question of federal law which has not previously been decided by this court.

The procedure ostensibly adopted by the United States Court of Appeals for the Fourth Circuit is not in accordance with the Federal Rules of Appellate Procedure. The Order denying the Petition for Rehearing indicates that a suggestion for an *en banc* was made, apparently *sua sponte* – The Order further indicates the Petition for Rehearing was decided by Judge Haynsworth, Butzner and Winter, the three judges who heard the appeal. In *Moody v. Albemarle Paper Co.* 417 U.S. 622, this court held that all non-senior judges should

vote on the question of an *en banc* hearing. See also Rule 35 of the Federal Rules of Appellate Procedure. Since the decision concerning the hearing *en banc* was not in accordance with accepted procedure, the case should be remanded to the United States Court of Appeals for the Fourth Circuit. *Lehmen Bros. v. Schein* 416 U.S. 386. The above is an important question of federal law which has not previously been decided by this court.

CONCLUSION

In conclusion, Petitioner urges this court to grant this court this Petition for the reasons stated above.

Respectfully submitted,

SHELDON H. BRAITERMAN
506 Tower Bldg.
Baltimore, Md. 21202

Attorney for Petitioner.

APPENDIX A

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

THE GREAT UNITED REALTY COMPANY, INCORPORATED
v.
UNITED STATES OF AMERICA and BALTIMORE FEDERAL SAVINGS AND LOAN ASSOCIATION, a body corporate

CIVIL NO. T74-1191

Filed: March 19, 1975

John D. Sebastian, of Silver Spring, Maryland, for plaintiff.

Parker B. Smith, Assistant United States Attorney, of Baltimore, Maryland, and Richard F. Mitchell, Trial Attorney, Tax Division, Department of Justice, of Washington, D.C., for United States.

Thomsen, Senior District Judge

This is an action by a corporate taxpayer to enjoin the collection of an assessment of additional income taxes against it for the taxable year ended March 31, 1971. Plaintiff claims that the assessment was made after the expiration of the statutory period of limitations and that the administrative levy is excessive in amount.

The government has moved to dismiss or in the alternative for a summary judgment in its favor for lack of jurisdiction. Since testimony has been taken and exhibits submitted, the motion to dismiss will be treated as a motion for summary judgment.

This action does not come within any of the statutory exceptions to the anti-injunction act, Section 7421 (a) of the Internal Revenue Code of 1954, 26 U.S.C. 7421 (a), and is barred by that statute unless plaintiff can establish "that under no circumstances could the Government ultimately prevail". *Enochs v. Williams Packing Co.*, 370 U.S. 1, 7 (1972). As the Court said in that case, also at p. 7: "We believe that the question of whether the Government has a chance of ultimately prevailing is to be determined on the basis of the information available to it at the time of suit. Only if it is then apparent that, under the most liberal view of the law and the facts, the United States cannot establish its claim, may the suit for an injunction be maintained." Plaintiff has an adequate remedy under the procedures authorized by the Internal Revenue Code.

1. The assessment was made on July 22, 1974. The return shows that it was signed on July 29, 1971, and was received with remittance on August 3, 1971. The assessment was made within the statutory period, which runs from the date of filing and not from the date when it should have been filed. Section 6501.*

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*Plaintiff's contention, made through its president, that it did not receive the statutory notice of deficiency, which was mailed to it on February 19, 1974, is therefore immaterial, as well as frivolous. Plaintiff's president testified that he did not accept the envelope containing the notice because it was addressed to Great United Realty Company, Inc., rather than to The Great United Realty Company, Inc. The mailing of the notice extended the time within which an assessment might be made. See Section 6503 (a)(1) and *Aura Grimes Bales v. Commissioner*, 22 T.C. 355 (1954)

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT
No. 75-1736

The Great United Realty
Company, Incorporated,
Appellant,

versus

United States of America and
Baltimore Federal Savings and
Loan Association, a body corporate,
Appellees.

Appeal from the United States District Court
for the District of Maryland, at Baltimore.
Roszel C. Thomsen, District Judge

Argued January 8, 1976 Decided Jan. 21, 1976

Before HAYNSWORTH, Chief Judge,
WINTER and BUTZNER, Circuit Judges

Sheldon H. Braiterman and James D. Johnson for Appellant; Jeffrey S. Blum, Attorney, United States Department of Justice (Scott P. Crampton, Assistant Attorney General, Gilbert E. Andrews and Grant W. Wiprud, Attorneys, Tax Division, United States Department of Justice, Jervis S. Finney, United States Attorney, and Mary Jennings and Parker B. Smith, on brief) for Appellee.

PER CURIAM:

This appeal involves an assessment, by the Internal Revenue Service, of a personal holding company tax against the appellant. It is contended that the statutory notice of deficiency was defective and that the appellant's president properly refused its receipt when the postman attempted to deliver it to him.

The deficiency notice was addressed to "Great United Realty Company, *Inc.*", whereas the proper name of the appellant is "*The* Great United Realty Company, *Incorporated.*" Additionally, the street address on the notice was "516 St. Paul *Street*" instead of the more correct "516 St. Paul *Place.*" These minor discrepancies were not sufficient to vitiate the notice, which unerringly found its way to the office of the taxpayer's president, who, thereupon, declined to receive it.

The District Court properly denied an application for an injunction against collection of the tax.

AFFIRMED.

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT
No. 75-1736

The Great United Realty Company, Incorporated,

Appellant,

versus

United States of America and Baltimore Savings and Loan Association,

Appellees.

Filed Feb. 11, 1973

ORDER

Upon consideration of the petition for rehearing, no request for a poll of the court being made on the suggestion for rehearing *en banc*, and with the concurrence of Judge Winter and Judge Butzner,

IT IS ORDERED that the petition be, and the same is hereby denied.

FOR THE COURT

Clement Haynsworth, Jr.
Chief Judge, Fourth Circuit

February 9, 1976

APPENDIX D

STATUTORY PROVISIONS

UNITED STATES CODE
Title 26, Section 541

"In addition to other taxes imposed by this chapter, there is hereby imposed for each taxable year on the undistributed personal holding company income (as defined in section 545) of every personal holding company (as defined in section 542) a personal holding company tax equal to 70 percent of the undistributed personal holding company income."

Title 26, Section 543(a)(2)

(a) General rule.– For purposes of this subtitle, the term "personal holding company income" means the portion of the adjusted ordinary gross income which consists of:

* * * * * * *

(2) Rents.–The adjusted income from rents; except that such adjusted income shall not be included if –

(A) Such adjusted income constitutes 50 percent or more of the adjusted ordinary gross income, and

(B) the sum of –

(i) the dividends paid during the taxable year (determined under section 562),

(ii) the dividends considered as paid on the last day of the taxable year under section 563(c) (as limited by the second sentence of section 563(b)), and

(iii) The consent dividends for the taxable year (determined under section 565),

equals or exceeds the amount, if any, by which the personal holding company income for the taxable year (computed without regard to this paragraph and paragraph (b), and computed by including as personal holding company income copyright royalties and the adjusted company income from mineral, oil, and gas royalties) exceeds 10 percent of the ordinary gross income.

Title 26, Section 547

"(a) General rule.– If a determination (as defined in subsection (c)) with respect to a taxpayer establishes liability for personal holding company tax imposed by section 541 (or by a corresponding provision of a prior income tax law) for any taxable year, a deduction shall be allowed to the taxpayer for the amount of deficiency dividends (as defined in subsection (d)) for the purpose of determining the personal holding company tax for such year, but not for the purpose of determining interest, additional amounts, or assessable penalties computed with respect to such personal holding company tax.

(b) Rules for application of section.–

(1) Allowance of deduction.– The deficiency dividend deduction shall be allowed as of the date the claim for the deficiency dividend deduction is filed.

(2) Credit or refund.– If the allowance of a deficiency dividend reduction results in an overpayment of personal holding company tax for any taxable year, credit or refund with respect to such overpayment shall be made as if on the date of the determination 2 years remained before the expiration of the period of limitation on the filing of claim for refund for the

taxable year to which the overpayment relates. No interest shall be allowed on a credit or refund arising from the application of this section.

(c) **Determination.**– For purposes of this section, the term "determination" means–

(1) a decision by the Tax Court or a judgment, decree, or other order by any court of competent jurisdiction, which has become final;

(2) a cloding agreement made under section 7121; or

(3) under regulations prescribed by the Secretary or his delegate, an agreement signed by the Secretary or his delegate and by, or on behalf of, the taxpayer relating to the liability of such taxpayer for personal holding company tax.

(d) **Deficiency dividends.**–

(1) **Definition.**– For purposes of this section, the term "deficiency dividends" means the amount of the dividends paid by the corporation on or after the date of the determination and before filing claim under subsection (e), which would have been includible in the computation of the deduction for dividends paid under section 561 for the taxable year with respect to which the liability for personal holding company tax exists, if distributed during such taxable year. No dividends shall be considered as deficiency dividends for purposes of subsection (a) unless distributed within 90 days after the determination.

(2) **Effect on dividends paid deduction.**–

(A) For taxable year in which paid.– Deficiency dividends paid in any taxable year (to the extent of the portion thereof taken into account under subsection (a) in determining personal holding company tax) shall not be included in the amount of dividends paid for such year for purposes of computing the dividends paid deduction for such year and succeeding years.

(B) For prior taxable year.– Deficiency dividends paid in any taxable year (to the extent of the portion thereof taken into account under subsection (a) in determining personal holding company tax) shall not be allowed for purposes of section 563 (b) in the computation of the dividends paid deduction for the taxable year preceding the taxable year in which paid.

(e) **Claim required.**– No deficiency dividend deduction shall be allowed under subsection (a) unless (under regulations prescribed by the Secretary or his delegate) claim therefor is filed within 120 days after the determination.

(f) **Suspension of statute of limitations and stay of collection.**–

(1) **Suspension of running of statute.**– If the corporation files a claim, as provided in subsection (e), the running of the statute of limitations provided in section 6501 on the making of assessments, and the bringing of distraint or a proceeding in court for collection, in respect of the deficiency and all interest, additional amounts, or assessable penalties, shall be suspended for a period of 2 yeasars after the date of the determination.

(2) **Stay of collection.**– In the case of any deficiency with respect to the tax imposed by section 541 established by a determination under this section –

(A) the collection of the deficiency and all interest, additional amounts, and assessable penalties shall, except in cases of jeopardy, be stayed until the expiration of 120 days after the date of the determination, and

(B) if claim for deficiency dividend deduction is filed under subsection (e), the collection of such part of the deficiency as is not reduced by the deduction for deficiency dividends provided in subsection (a) shall be stayed until the date the claims is disallowed (in whole or in part), and if disallowed in part collection shall be made only with respect to the part disallowed.

No distraint or proceeding in court shall be begun for the collection of an amount the collection of which is stayed under subparagraph (A) or (B) during the period for which the collection of such amount is stayed.

(g) Deduction denied in case of fraud, etc.– No deficiency dividend deduction shall be allowed under subsection (a) if the determination contains a finding that any part of the deficiency is due to fraud with intent to evade tax, or to wilful failure to file an income tax return within the time prescribed by law or prescribed by the Secretary or his delegate in pursuance of law.

(h) Effective date.– Subsections (a) through (f), inclusive, shall apply only with respect to determinations made more than 90 days after the date of enactment of this title. If the taxable year with respect to which the deficiency is asserted began before January 1, 1954, the term "deficiency dividend" includes only amounts which would

have been includible in the computation under the Internal Revenue Code of 1939 of the basic surtax credit for such taxable year. Subsection (g) shall apply only if the taxable year with respect to which the deficiency is asserted begins after December 31, 1953.

Title 26, Section 6212

(a) In general.– If the Secretary or his delegate determines that there is a deficiency in respect of any tax imposed by subtitles A or B, he is authorized to send notice of such deficiency to the taxpayer by certified mail or registered mail.

(b) Address for notice of deficiency.–

(1) Income and gift taxes. – In the absence of notice to the Secretary or his delegate under section 6903 of the existence of a fiduciary relationship, notice of a deficiency in respect of a tax imposed by subtitle A or chapter 12, if mailed to the taxpayer at his last known address, shall be sufficient for purposes of subtitle A, chapter 12, and this chapter even if such taxpayer is deceased, or is under a legal disability, or, in the case of a corporation, has terminated its existence.

* * * * * * * *

Title 26, Section 6213(a)

(a) Time for filing petition and restriction on assessment.– Within 90 days, or 150 days if the notice is addressed to a person outside the States of the Union and the District of Columbia, after the notice of deficiency authorized in section 6212 is mailed (not counting Saturday, Sunday, or a legal holiday in the District of Columbia as the last day), the taxpayer may file a petition with the Tax Court for a redetermination of the deficiency. Except as otherwise

provided in section 6861 no assessment of a deficiency in respect of any tax imposed by subtitle A or B and no levy or proceeding in court for its collection shall be made, begun, or prosecuted until such notice has been mailed to the taxpayer, nor until the expiration of such 90-day or 150-day period, as the case may be, nor, if a petition has been filed with the Tax Court, until the decision of the Tax Court has become final. Notwithstanding the provisions of section 7421(a), the making of such assessment or the beginning of such proceeding or levy during the time such prohibition is in force may be enjoined by a proceeding in the proper court.

Title 26, Section 7421

(a) Tax.– Except as provided in sections 6212(a) and (c), 6213(a), and 7426(a) and (b) (1), no suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court by any person, whether or not such person is the person against whom such tax was assessed.

Title 28, United States Code
Section 46(c)

(c) Cases and controversies shall be heard and determined by a court or division of not more than three judges, unless a hearing or rehearing before the court in banc is ordered by a majority of the circuit judges of the circuit who are in regular active service. A court in banc shall consist of all circuit judges in regular active service. A circuit judge of the circuit who has retired from regular active service shall also be competent to sit as a judge of the court in banc in the rehearing of a case or controversy if he sat in the court or division at the original hearing thereof.

No. 75-1769

In the Supreme Court of the United States

OCTOBER TERM, 1976

THE GREAT UNITED REALTY COMPANY, INC.,
PETITIONER

v.

UNITED STATES OF AMERICA, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

ROBERT H. BORK,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

In the Supreme Court of the United States

OCTOBER TERM, 1976

No. 75-1769

THE GREAT UNITED REALTY COMPANY, INC.,
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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

The question presented in this federal income tax case is whether a notice of an income tax deficiency issued by the Commissioner of Internal Revenue to petitioner was invalid because the name and address of petitioner, as set forth in the notice, contained minor discrepancies.

The pertinent facts are as follows: Petitioner is a corporation whose formal name is The Great United Realty Company, Incorporated, and whose street address is 516 St. Paul Place. The notice of deficiency was addressed to "Great United Realty Company, Inc." at "516 St. Paul Street." The notice was delivered to petitioner's office, but Milton F. Kirsner, petitioner's president, refused to accept the notice on the ground that the name and address were erroneously stated. Petitioner thereupon brought this suit in the United States District Court for the District of Maryland to enjoin collection of the taxes

at issue. The district court entered summary judgment for the government (Pet. App. A 1-2)[1] and the court of appeals affirmed *per curiam* (Pet. App. B 3-4).

1. Section 6212 of the Internal Revenue Code of 1954 (26 U.S.C.) authorizes the Commissioner of Internal Revenue to notify taxpayers by mail of the determination of a tax deficiency. Section 6213(a) allows a taxpayer to file a petition for redetermination of a deficiency in the Tax Court within 90 days after a notice of deficiency is mailed. The Anti-Injunction Act, Section 7421 of the Code, prohibits suits to restrain the assessment or collection of taxes. However, with certain exceptions not here relevant, Section 6213(a) permits such injunctive actions against the assessment or collection of taxes until the notice of deficiency has been mailed to the taxpayer and the period for filing a petition in the Tax Court has expired.

Here, petitioner's claim to injunctive relief rests upon its contention that it never received the notice of deficiency. Petitioner's president testified that, although the notice was delivered to his office by certified mail, he refused to accept it because of the errors in the name and address. Petitioner contends (Pet. 7) that it was entitled to refuse the notice because it "did not bear the petitioner's true name."

But it has been uniformly held that where the notice of deficiency was delivered to the proper address, it was not invalidated by minor discrepancies in the address. See, *e.g.*, *Wright* v. *Commissioner*, 101 F. 2d 309 (C.A. 4); *Whitmer* v. *Lucas*, 53 F. 2d 1006 (C.A. 7). Moreover, where delivery of a notice of deficiency is attempted at

[1]A portion of the opinion of the district court is omitted from the appendix to the petition (Pet. App. A 1-2). We therefore set forth the full opinion of the district court in the Appendix, *infra*.

the proper address, the notice is not invalidated by a taxpayer's refusal to accept it. *Brown* v. *Lethert*, 360 F. 2d 560 (C.A. 8). Indeed, if the notice is properly mailed to the taxpayer's last known address, it is valid even if the taxpayer never receives it. See Section 6212(b), Internal Revenue Code of 1954; *Luhring* v. *Glotzbach*, 304 F. 2d 556 (C.A. 4). See also *Mullane* v. *Central Hanover Bank & Trust Co.*, 339 U.S. 306.[2]

2. Petitioner further contends (Pet. 9-10) that it has been denied the benefits of the deficiency dividends deduction provisions of Section 547 of the Code. Section 547 provides that where liability for personal holding company taxes has been determined in any court of competent jurisdiction, the taxpayer is entitled to a deduction for deficiency dividends thereafter declared and paid for the taxable year involved. If the deduction results in an overpayment of personal holding company taxes, the taxpayer may file a claim for refund for the overpayment.

Although petitioner would have been entitled to the benefits of Section 547 had the Tax Court ruled adversely to it on the merits, it cannot complain (Pet. 9) that it has been "deprived of his [*sic*] opportunity to have his [*sic*] case heard in the United States Tax Court" when it had ample opportunity to file a petition in the Tax Court but failed to do so. At all events, the matter is still not irreparable, for corresponding relief is available under Section 547 if

[2]The authorities upon which petitioner relies (Pet. 7-9) are distinguishable. Those cases involved situations where the notice was sent to a nonexistent taxpaying entity, or to the purported representative of a nonexistent entity, or to an individual who did not properly represent the taxpayer against which a deficiency had been determined. *Shea* v. *Commissioner*, 31 B.T.A. 513; *Dombrowski* v. *Commissioner*, 35 B.T.A. 1028; *J. A. Hampton & Son* v. *Commissioner*, decided April 11, 1934, P-H Memo B.T.A. para. 34,193 (30 B.T.A. 1462).

petitioner chooses to litigate its personal holding company tax liability in a suit for a refund.[3]

For the reasons stated, it is respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

JULY 1976.

[3]Petitioner also contends (Pet. 10-11) that the case should be remanded for a poll of the judges of the court of appeals as to whether there should be a rehearing *en banc*. The order denying rehearing (Pet. App. A 5), entered by the panel which decided the case, indicated that there was a suggestion of rehearing *en banc* but no request for a poll. Rule 35(b) of the Federal Rules of Appellate Procedure provides that there shall be no poll as to rehearing *en banc* unless it is requested by "a judge in regular active service or a judge who was a member of the panel that rendered a decision sought to be reheard * * *." *Moody* v. *Albemarle Paper Co.*, 417 U.S. 622, upon which petitioner relies, does not purport to determine the circumstances under which such a poll shall be taken, but only how the poll shall be conducted, *i.e.*, which judges shall vote.

DOJ-1976-07

APPENDIX

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MARYLAND

THE GREAT UNITED REALTY COMPANY, INCORPORATED

v.

UNITED STATES OF AMERICA and BALTIMORE FEDERAL SAVINGS AND LOAN ASSOCIATION, a body corporate

CIVIL NO. T 74-1191

Filed: March 19, 1975

John D. Sebastian, of Silver Springs, Maryland, for plaintiff.

Parker B. Smith, Assistant United States Attorney, of Baltimore, Maryland, and Richard F. Mitchell, Trial Attorney, Tax Division, Department of Justice, of Washington, D.C., for United States.

Thomsen, Senior District Judge

This is an action by a corporate taxpayer to enjoin the collection of an assessment of additional income taxes against it for the taxable year ended March 31, 1971. Plaintiff claims that the assessment was made after the expiration of the statutory period of limitations and that the administrative levy is excessive in amount.

The government has moved to dismiss or in the alternative for a summary judgment in its favor for lack of jurisdiction. Since testimony has been taken and exhibits submitted, the motion to dismiss will be treated as a motion for summary judgment.

This action does not come within any of the statutory exceptions to the anti-injunction act, § 7421 (a) of the Internal Revenue Code of 1954, 26 U.S.C. 7421 (a), and is barred by that statute unless plaintiff can establish "that under no circumstances could the Government ultimately prevail". *Enochs* v. *Williams Packing Co.*, 370 U.S. 1, 7 (1972). As the Court said in that case, also at p. 7: "We believe that the question of whether the Government has a chance of ultimately prevailing is to be determined on the basis of the information available to it at the time of suit. Only if it is then apparent that, under the most liberal view of the law and the facts, the United States cannot establish its claim, may the suit for an injunction be maintained." Plaintiff has an adequate remedy under the procedures authorized by the Internal Revenue Code.

1. The assessment was made on July 22, 1974. The return shows that it was signed on July 29, 1971, and was received with remittance on August 3, 1971. The assessment was made within the statutory period, which runs from the date of filing and not from the date when it should have been filed. § 6501.*

2. Plaintiff alleges that it "believes and affirms that the aforesaid Notices of Levy and Final Notices Before Seizure are illegal and excessive and are, in fact, not due and owing". It appears from the documents submitted by the respective parties that it is by no means clear that the Government cannot establish its claim.

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* Plaintiff's contention, made through its president, that it did not receive the statutory notice of deficiency, which was mailed to it on February 19, 1974, is therefore immaterial, as well as frivolous. Plaintiff's president testified that he did not accept the envelope containing the notice because it was addressed to Great United Realty Company, Inc., rather than to The Great United Realty Company, Inc. The mailing of the notice extended the time within which an assessment might be made. See § 6503 (a) (1) and *Aura Grimes Bales* v. *Commissioner*, 22 T.C. 355 (1954).

Judgment will therefore be entered dismissing this action, without prejudice to any right plaintiff may have to challenge the assessment in any manner provided by law.

(sign ·d Roszel C. Thomsen)

Senior United States District Judge